Re Kho Kak Siew, ex p MUI Bank Bhd

HIGH COURT (KUCHING) — BANKRUPTCY NO 468 OF 1989
HAIDAR J
9 OCTOBER 1992

Bankruptcy *— Receiving and adjudication order — Application to annul — Whether creditor a secured creditor — Failure by creditor to comply with s 5(2) of Bankruptcy Act 1967 — Definition of secured creditor — Bankruptcy Act 1967 ss 2 & 5(2)*

The debtor filed a notice of motion for an order that the receiving and adjudication order made against him be annulled and rescinded under s 105 of the Bankruptcy Act 1967 ('the Act') on the ground, inter alia, that the creditor is a secured creditor and had failed to specify in the petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s 5(2) of the Act.

Held, dismissing the motion:

(1) In construing s 5(2) of the Act, the definition of 'secured creditor' in s 2 is relevant. The definition gives a restricted meaning to 'secured creditor' and refers to 'secured creditor' as a person holding a charge on the property of the debtor as a security for a debt due to him from the debtor. The two limbs in the definition are that the creditor is to hold property belonging to the debtor and the property held as a security is for the debt due to the creditor from the debtor. In the present case, the creditor does not hold a charge on a property belonging to the debtor but instead the property belongs to a third party. The property is also held as a security for the debt due to the creditor from another company and not the debtor. The definition would therefore exclude chargees holding a third party charge as in the present case. The creditor is therefore outside the purview of s 5(2) read with s 2 of the Act.

(2) It is too late for the debtor to raise the issue that the interest charged was in excess of that provided by O 42 r 12 of the Rules of the High Court 1980 as he had not given notice to the creditor under s 3(2)(ii) of the Act disputing the validity of the bankruptcy notice by reason of the excessive interest.

[Bahasa Malaysia summary

Penghutang memfailkan suatu notis usul untuk suatu perintah supaya perintah penerimaan dan penghukuman yang dibuat terhadapnya dibatalkan di bawah s 105 Akta Kebankrapan 1967 ('Akta itu') atas alasan, antara lain, bahawa pemiutang adalah seorang pemiutang bercagar dan telah gagal menyatakan dalam petisyen kerelaan mereka untuk menyerahkan cagaran jikalau penghutang diputuskan sebagai

A seorang bankrap atau memberi suatu anggaran cagaran seperti yang dikehendaki di bawah s 5(2) Akta itu.

Diputuskan, menolak usul itu:

(1) Apabila mentafsirkan s 5(2) Akta itu, takrifan 'secured creditor' di dalam s 2 adalah relevan. Takrifan itu memberi makna yang terhad terhadap 'secured creditor' dan merujukkan kepada 'secured creditor' sebagai seseorang yang memegang suatu gadaian ke atas harta penghutang sebagai suatu cagaran terhadap hutang yang patut dibayar kepadanya daripada penghutang. Kedua-dua cabang dalam takrifan itu adalah bahawa pemiutang akan memegang harta yang dimiliki oleh penghutang dan harta itu dipegang sebagai cagaran untuk hutang yang perlu dibayar kepada pemiutang oleh penghutang. Di dalam kes ini, pemiutang tidak memegang cagaran ke atas harta yang dimiliki oleh penghutang tetapi harta itu dimiliki oleh pihak ketiga. Harta itu juga dipegang sebagai cagaran untuk hutang yang perlu dibayar kepada pemiutang oleh sebuah syarikat yang lain dan bukan penghutang. Oleh itu, takrifan itu akan mengecualikan pemegang gadaian yang memegang gadaian pihak ketiga seperti di dalam kes ini. Oleh itu, pemiutang adalah di luar skop s 5(2) dibaca dengan s 2 Akta itu.

(2) Adalah terlambat untuk penghutang menimbulkan isu bahawa faedah yang dikenakan adalah lebih daripada yang diperuntukkan oleh A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 kerana beliau tidak memberi notis kepada pemiutang di bawah s 3(2)(ii) Akta itu untuk mempertikaikan keesahan notis kebankrapan kerana faedah yang berlebih-lebihan itu.]

[*Editorial Note*: The debtor has appealed to the Supreme Court vide Civil Appeal No 02–483–92.]

Cases referred to

1 *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16 (folld)
2 *Rabindera Singh s/o Arjan Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] CLJ 858 (refd)
3 *Re Perkins, ex p Mexican Santa Barbara Mining Co* [1890] QB 613 (refd)
4 *Re Arunachalam, ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 2, 5(2)
Rules of the High Court 1980 O 42 r 12

John Lim (*Tiong Lim Wong & Co*) for the petitioning creditor.
Matthew Chan (*Matthew TK Chan & Co*) for the debtor.
M Suhaibudden for the Official Assignee.

Cur Adv Vult

Haidar J: The debtor, Kho Kak Siew, filed a notice of motion on 21 October 1991 (encl 14) for an order that the receiving and adjudication order to take effect three months from 22 February 1991 be annulled and rescinded under and subject to the provisions of s 105 of the Bankruptcy Act 1967 ('the Act'). The receiving and adjudication order was made with the consent of the debtor who was represented by Mr Stanley Eddy. An affidavit in support of the motion was filed by the debtor. The creditor through its manager, Goh Lam Hua, opposed the motion by filing an affidavit in opposition on 17 January 1992 (encl 25). The debtor further filed supplementary affidavits dated 5 November 1991 and 24 March 1992 and a corrective affidavit on 8 April 1992.

In the affidavits in support of the motion, the debtor (bankrupt), it would appear, is relying on two grounds, namely:

(1) The debtor ought not to have been adjudged a bankrupt while the creditor is actively pursuing the foreclosure action.
(2) The creditor is a secured creditor and had failed to specify in the petition their willingness to give up the security in the event that the debtor is adjudged a bankrupt or give an estimate of the security as required by s 5(2) of the Bankruptcy Act 1967.

In addition thereto, by the submission of Mr Matthew Chan, counsel for the debtor, an additional ground was also relied on, that is, the interest on the judgment sum carries interest at the rate of 15%pa contrary to O 42 r 12 of the Rules of the High Court 1980 which prescribes the interest rate at 8%pa from date of judgment until the judgment is satisfied.

Brief facts

AIW Sdn Bhd, the first defendant in Suit No KG 13 of 1987, applied for various banking facilities from the creditor. The securities, among others, furnished to secure the facilities are:

(i) two charges over a parcel of land known as Lot 864, section 66 KTLD belonging to Syarikat Hock Kwong Furniture and Woodworking Factory Sdn Bhd, a third party. Two memorandum of charges were executed vide nos L5457/83 and L5843/83 (see exh GLH2). The sum to be extended in various forms to AIW Sdn Bhd is RM2,750,000; and
(ii) a letter of guarantee given by AIW Sdn Bhd's directors, Encik Mohd Salleh Arbi and Mr Kho Kak Siew (the debtor) (see exh GLH5).

AIW Sdn Bhd failed to maintain the facilities in a satisfactory status and accordingly, foreclosure action vide Originating Summons No 19 of 1985 (see exh GLH3) was initiated to auction Lot 864. A suit was also commenced to enforce the letter of guarantee vide High Court No KG 13 of 1987.

At the time the receiving and adjudication order took effect, the foreclosure action was still pending. Judgment in default of appearance was entered against Mohd Salleh Arbi on 19 December 1987 and by a court order dated 12 November 1988 (exh GLH1), final judgment was entered

against AIW Sdn Bhd and the debtor partially. In respect of the debtor vide GLH1, the final judgment entered against him is for the sum of RM1,920,409.69 with interest thereon at the rate of 15%pa from 24 November 1986 until full and final payment and costs and it was further ordered that the residue of the creditor's claim against the debtor in the sum of RM1,889,449.82 representing the term loan facility do proceed to trial.

In respect of the debtor, bankruptcy action based on the portion of the court order that gave final judgment to the plaintiff was commenced against him. By consent, he was adjudged a bankrupt when the conditional receiving and adjudication order took effect.

Ground (1)

At para 12 of the debtor's affidavit affirmed on 12 October 1991, the debtor contends that he ought not to have been adjudged a bankrupt while the creditor is actively pursuing the foreclosure action. I am of the view that there is no basis for such a contention. The Supreme Court in *Bank Bumiputra Malaysia Sdn Bhd v Esah bte Abdul Ghani*[1] laid to rest the contention that it is improper to commence a foreclosure action and at the same time enforce a guarantee.

The creditor having obtained final judgment against the debtor in High Court Suit No KG 13 of 1987 and there has been no appeal on the said judgment and in the absence of a stay of execution order, the creditor is entitled to enforce the judgment to secure payment by execution proceedings or as the judgment debt exceeded RM2,000, to bankrupt the debtor as was done in this case. Therefore the debtor failed on this ground.

Ground (2)

The debtor alleged that the creditor's action is in violation of s 5(2) of the Act. The debtor claimed that the creditor is a secured creditor and had failed to specify in the petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s 5(2) of the Act.

The creditor is not disputing that they did not in their petition specify those information but contended that they are under no legal obligation to do so as they claim that they are outside the ambit of s 5(2) of the Act.

Section 5(2) of the Act reads:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

In construing s 5(2) of the Act, we have to fall back on the definition of 'secured creditor' as defined in s 2 of the Act. According to s 2, 'secured creditor' means:

> a person holding a mortgage, charge, lien on the property of the debtor or any part thereof as security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

It is apparently clear, in my view, that the definition gives a restricted meaning to 'secured creditor' and in no uncertain terms refers 'secured creditor' as a person holding a charge *on the property of the debtor as a security for a debt due to him from the debtor.* The two limbs in the definition are that the creditor is to hold property belonging to the debtor and the property held as a security is for the debt due to the creditor from the debtor. In the present case, the creditor does not hold a charge on a property belonging to the debtor but instead the property belongs to Syarikat Hock Kwong Furniture and Woodworking Factory Sdn Bhd, a third party (see exh GLH2). In any event, the property is held as a security for the debt due to the creditor from AIW Sdn Bhd and not that of the debtor. The definition would therefore exclude chargees holding a third party charge as in the present case (see *Rabindera Singh s/o Arjan Singh, ex p Malaysian International Merchant Bankers Bhd;*[2] *Re Perkins, ex p Mexican Santa Barbara Mining Co.*[3] Further, 2 *Halsbury's Laws of England* (2nd Ed) at p 64 pertaining to definition of 'secured creditor' said:

> The mortgage or other charge, the holding of which constitutes a person a secured creditor, must be a mortgage or charge on the property of the debtor. A security on the property of a third person, even though it be for the same debt, does not constitute the holder a secured creditor.

It would seem clear, in my opinion, that the creditor is outside the purview of s 5(2) read with s 2 of the Act and the question of the creditor's action violating s 5(2) of the Act does not arise at all. The debtor therefore failed on this ground.

In respect of the additional ground relied on by the debtor's counsel in his written submission, it is to be noted that the interest charged was in accordance with the judgment obtained (see GLH1). There has been no appeal in respect of the said judgment. The bankruptcy notice was issued in accordance with the judgment obtained against the debtor. In any event, it is too late for the debtor to raise this issue now as he had not given notice to the creditor under s 3(2)(ii) of the Act. The subsection reads:

> Provided that a bankruptcy notice —
> (i) ...
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Section 3(2)(ii) of the Act was considered by Chang Min Tat J (as he then was) in *Re Arunachalam, ex p Indian Overseas Bank Ltd*[4] at p 90:

A On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.

For the reasons set out by me, this additional ground of the debtor is totally
B baseless and accordingly, the debtor failed on this ground also.

In the circumstances, I dismissed the notice of motion of the debtor with costs. The debtor appealed against my said order.

Motion dismissed.

C Reported by Zarinah Marican

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